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IMPORTANT NOTICE For All Who Receive The Leaflet

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THE EDITORS

VIDEANT CONSULES

In two parts—Part I

During the most troubled century of Roman history the senate had frequent recourse to a curious decree,—the one generally known as the *senatus-consultum ultimum*, and particularly familiar in the form exploited by the most voluble of Romans,—*Videant consules nequid detrimenti res publica capiat*. There is a fine terseness to this sentence which has endeared it to orators. It has to all seeming, the broadness of scope, the loftiness of sentiment, which are two notable characteristics of the Roman as a moulder of states. And then, it is associated with some of the most interesting personages of Roman story,—with the Gracchan *par nobile fratrum*, with Cicero, with the Julius of mighty memory.

But it was anything but characteristically Roman. Directness of aim, definiteness of meaning, these more than anything else give Roman legislation its distinctive stamp. The decree in question, from whatever standpoint we view it, is indirect in purpose and vague in expression. The terms in which it is couched, give no notion of the actual effect. It did what so few Roman laws condescended to do; it hid its real design.

If we take the words literally, the inference would be justified that the decree is no more than a sharp admonition to the consul to attend to his duties. Tacitus (Ann IV 19) quotes Tiberius as summing up the essential function of the consul in these very words. It is evident that the brief sententiousness of the phrase appealed to the character of both emperor and historian. But that no such literal construction is possible, is patent enough.

The view generally accepted,—propagated from generation to generation of commentaries and dictionaries—is to the effect that, by the *senatus-consultum ultimum*, the consuls were clothed with dictatorial power (Smith Dict of Ant s v *consul*, Weissenborn Liv III 49). This ought only to mean that the consuls were vested with the full absolute power enjoyed by Cincinnatus, by Corvinus and Camillus in the spacious days of the conquest of Italy. But that would be in too glaring and obvious contradiction with nearly all that we know of the historical circumstances which accompanied and followed the decree. We accordingly find the current view promptly modified. Not a dictatorship, but a quasi-dictatorship, a kind of a sort of dictatorship, was it which the consuls received: a conclusion difficult to attack, but hardly satisfactory.

There is indubitably authority in classical writers for the conception generally held. In the first place there is the statement of Sallust, an attempt at a set definition (Cat 29): *Itaque quod plerumque in atroci negotio solet, senatus decrevit darent operam consules ne quid res publica detrimenti caperet. Ea potestas per senatum magistratui maxima permittitur, exercitum parare, bellum gerere, coercere omnibus modis socios atque civis, domi militiaeque imperium atque iudicium summum habere; aliter sine populi iussu nullius earum rerum consuli ius est.*

Another direct statement is that of Plutarch (C Gracchus XVIII) that Opimius was the first consul to use the powers of a dictator, a phrase to which we shall return.

Apart from these, there are indications, which must not be underrated, in the terms in which the decree is referred to by those whom it affected favorably or adversely. Cicero (Cat 1 2) speaks of it as of some terrible weapon put in his hands. Caesar (B C 1 5) indignantly deprecates the employment against him of what he styles *illud extremum atque ultimum senatus consultum*; but he entertains no doubt of its legitimate use in its proper place. Livy (III 4 9), although clearly committing an anachronism, speaks of it as *quae forma senatus consulti ultimae semper necessitatis habita est*. Frequently as the decree is mentioned, the foregoing are practically the only passages in which any comment whatever is offered.

One thing is noticeable. Except in the phrase of Plutarch there is no mention, even in the prolix explanation of Sallust, of the word dictator or quasi-dictator in connection with the enlarged authority of the consul. If the extraordinary powers so conferred resembled those of a dictator it is at least strange that the fact is not explicitly stated. For Plutarch's statement is not quite explicit. It may mean no more than that Opimius arrogated to himself a power to which he had no claim. Besides, if the statement left nothing to be desired in clearness, Plutarch is hardly a respectable authority on Roman political institutions. That the *senatus consultum ultimum* did not have the effect of the appointment of the dictator, or even approximately that effect, is indicated by Appian's surprise (B C I 16) that in the Gracchan troubles the time-honored device of a dictator was not resorted to.

While Sallust, to be sure, does not use the word, he gives the substance of the dictatorial powers. The passage is a troublesome one. Willems (Le Sénat de la République vol II) unceremoniously rejects it as an intruding marginal gloss, and this solution is undoubtedly tempting. But the determination of the soundness of the text is unnecessary. An examination of the passage itself deprives it of any right to be considered a final authority. It is not only careless and redundant, but it is positively inaccurate. It is simply not a fact that the consul needs this extraordinary decree to exercise plenary jurisdiction over the allies, or to wield the unlimited *imperium* abroad. If Sallust wrote that, he sinned through

haste or ignorance, either of which assumptions is equally fatal.

We are thrown then upon what seems to have been the impression which Cicero, Cæsar and Livy received from the decree, in the previously cited allusions.

Against the theory that the consuls received dictatorial powers by the *senatus consultum ultimum* there are many weighty considerations.

In the first place, it was not merely the consuls who were charged with the vital duty of preserving the state. In the case of Saturninus, 100 B C (Cicero *pro Rab perduell* VII 20) the consuls are directed to impress into that service praetors and tribunes of the plebs as well. In 77 B C (Sall *Or Phil* 22) the interrex Ap Claudius, the proconsul Q Catulus and all officers near the city, possessing the imperium, are expressly named. In 52 B C after the murder of Clodius (Ascon *Cic pro Milone* XXIII 61) a still more explicit command is directed to the interrex, to the tribunes, and to the then proconsul, Pompey. In 49 B C (Cæsar *B C V*) the consuls, praetors, tribunes, and all magistrates possessing the imperium are mentioned.

When we remember that the entire *raison d'être* of the dictator was the necessity of uniting in a single head all the powers of the government in moments of intense emergency, the inapplicability of the name to an authority conferred with such indiscriminate generosity becomes evident. Are all the members of these groups dictators? Is the difficulty involved in the intercession of a single colleague removed by the creation of a dozen? Woe to the broth for which so many cooks are appointed! It is quite clear that if the senate desired effectually to clog the movements of the executive, it could have chosen no better method. Remembering that the effects of such a clogging would have been a free hand for the senate itself, we may seriously wonder whether that was not its express desire.

Historically, what are the facts? With the exception of Opimius in 121 B C not one of these various quasi-dictators ventured to exercise the essentially discretionary power seemingly bestowed on him. Not only is it in the interest of the senate that the decree is passed, but it is the senate which, with barely a pretence of deference to the constitutional magistrates, directly performs the offices of the executive. Cicero (*In Pisonem* VII) in so many words states that the consul's duties under the circumstances were confined to reporting and advising, that the responsibility for action rested with the senate. He loses no opportunity of reminding that body—binding it under their noses, as the Germans say—that the actual performance of any extra-legal acts was theirs and not his.

The senate does not seem to have passed the decree with any excessive reluctance. Only twice was it extorted from them by the dominant personality of a conqueror. Everywhere else they have recourse to this formidable weapon of their own mere motion, with the avowed purpose of crushing their enemies. If a dictatorship was the result of the *senatus consultum ultimum*, it was a dictatorship of which the senate enjoyed the fruits and exercised the prerogatives.

But it was not a dictatorship of the old kind,—that is, in a strictly legal sense it was not a dictatorship at all. The dictator's powers were very extensive. Having no colleagues, he was not subject to intercessio. He was independent of the senate in that he was under no necessity of receiving their

instructions or accepting their advice. He was irresponsible, being both unappealable and unaccountable. But broad as was the scope of the office, it was essentially a legal, constitutional office. It was created by a definite law (*optima lex*); its powers received a technical designation, (the *maius imperium*). And it was limited. The dictator might not without consent of the senate dispose of the public funds. Further, under the laws of Gaius Gracchus aimed against evasion of the *Leges Valeriae*, the prohibition of the suspension of the right of appeal might easily have been enforced even against the dictator.

Clearly this would have only partly served the senate. Its only purpose in desiring this power, was its tremendous force as a weapon in the struggle with the popular party. Nearly every one of the decrees "*Videant consules*" is directed against some leader, self-styled or accredited, of the *populares*. More than anything else, the right of appeal was an obstacle which demanded removal and which the *senatus consultum ultimum* did remove.

This could not be done constitutionally. It follows inevitably that the *senatus consultum ultimum* was an unconstitutional measure and must have been so recognized. Mommsen showed long ago that the passing of this decree was an act of revolution, even though it emanated from the hotbed of conservatism. It was frankly outside, or as the optimates would have put it, above the law. Crediting the senators, or the better men among them, with sincerity and integrity, there can have been only one colorable pretext for such a course, and that was,—imminent danger to the state and the imperative necessity of preserving it.

That seems to have been the attitude of the senate. In the interests of the state, they had transgressed the law and found their justification in the danger they had averted. The *optima lex* suspended, certain definite laws, leaving others unchanged, and substituted for those suspended another law almost equally definite. The *senatus consultum ultimum* suspended the constitution itself.

It is with deep and sincere regret that The Leaflet announces to its readers the death of Professor Mortimer Lamson Earle of the Department of Classical Philology of Columbia University.

Professor Earle, during a summer's sojourn among the islands of the Mediterranean, contracted typhoid fever, returned ill to this country, and now has fallen a victim to the insidious disease from which he suffered. Still a young man—he was only in his forty-first year—Professor Earle by his indefatigable industry, his enthusiasm for his work, and his kindness to all who came into contact with him, had endeared him to a large circle of friends and pupils. An only too rare contributor to our columns, he was familiar to the members of the Latin Club as a frequent visitor at its meetings, where he often participated in the discussions. Great things were expected, but an inexorable fate decreed otherwise. *Ὁν γὰρ θεοὶ φιλοῦσιν, ἀποθνήσκει νέος.* Sit tibi terra levis.